

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

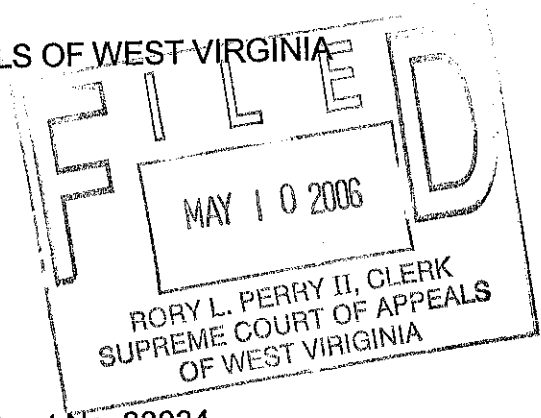
STATE OF WEST VIRGINIA,
Appellee,

v.

NORMA JEAN SAUNDERS,
Appellant.

Supreme Court No. 33034

Circuit Court No. 04-F-35
(Kanawha)



APPELLANT'S BRIEF

Barbara A. Brown
Deputy Public Defender
W.Va. Bar No. 5121
Kanawha County Public Defender Office
P.O. Box 2827
CHARLESTON, WV 25330
(304) 558-2323

Counsel For Appellant

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RULE

W.V.R.Cr.P., Rule 11(a)(2) 2

STATUTE

W.Va. Code §22-15-15(b)(4) *passim*

PROCEEDINGS AND RULINGS BELOW

Norma Jean Saunders was charged in a three-count felony indictment of violating W.Va. Code §22-15-15(b)(4). The indictment charges Norma Jean Saunders with violating a "cease and desist" order in August, October and December of 2002. All three counts of the indictment read in relevant part as follows:

... Norma Jean Saunders ... [U]nlawfully, feloniously, knowingly, and willfully violate[d] a cease and desist order of the West Virginia Department of Environmental Protection issued on the 28th day of August, 2002, pursuant to the Consent Order of the West Virginia Environmental Quality Board issued on the 9th day of August, in the matter of Rick's Used Auto Parts v. Ken Ellison, Director, Division of Waste Management, Department of Environmental Protection, in violation of Chapter 22, Article 15, Section 15(b)(4) ...

West Virginia Code §22-15-15 sets out misdemeanor offenses at subdivisions (b)(1), (2) and (3) for first time convictions including first time convictions for violating cease and desist orders, and the felony offense is set out at subdivision (b)(4) for second or subsequent convictions. West Virginia Code 22-15-15(b)(1), (2), (3) and (4) reads in relevant part as follows:

(b) Any person who violates this article, or permits issued pursuant to this article or rules or orders issued by the secretary or board is subject to administrative, civil and criminal sanctions as follows:

(1) Any person who fails or refuses to discharge any duty imposed upon him or her by this article or by any rule of the secretary promulgated pursuant to the provisions and intent of this article or by an order of the secretary or board, or who fails or refuses to apply for and obtain a permit as required by the provisions of this article, or who fails or refuses to comply with any term or condition of the permit, is guilty of a misdemeanor...

(2) Any person who intentionally misrepresents any material fact in an application, record, report, plan or other document filed or required to be maintained under the provisions of this article or any rules promulgated by the secretary thereunder is guilty of a misdemeanor...

(3) Any person who willfully or negligently violates any provision of any permit issued under or subject to the provisions of this article or who willfully

negligently violates any provision of this article or any rule of the secretary or any order of the secretary or board is guilty of a misdemeanor...

(4) **Any person convicted of a second offense or subsequent willful violation** of subdivision (2) or (3) of this subsection or knowingly and willfully violating any provision of any permit, rule or order issued under or subject to the provisions of this article or knowingly and willfully violating any provision of this article, **is guilty of a felony...**

(Emphasis Added.)

On February 24, 2004, the appellant filed a Motion To Dismiss the indictment on the grounds that the indictment failed to allege the essential element of a prior conviction under W.Va. Code §22-15-15(b)(4). By Order entered April 2, 2004, the trial court denied the appellant's Motion to Dismiss, and adopted the State's interpretation of subsection 15(b)(4). The Court ruled that subsection 15(b)(4) includes a disjunctive "or"; therefore, "a prior conviction under the statute is one manner in which a defendant may be charged with a felony, but not the exclusive way. Here the State alleges, tracking the language of the statute, that the appellant knowingly and willfully violated a cease and desist order issued by the West Virginia Department of Environmental Protection."

On March 28, 2005, with the consent of the court and the approval of the prosecuting attorney, the appellant entered a conditional plea of guilty to count one in compliance with W.V.R.Cr.P., Rule 11(a)(2), with the expectation that she would appeal the trial court's adverse ruling against her Motion To Dismiss. On June 10, 2005, the Court sentenced Norma Jean Saunders to six (6) months probation and a \$250.00 fine.

ASSIGNMENTS OF ERROR

I. THE CIRCUIT COURT ERRED IN DENYING THE APPELLANT'S MOTION TO DISMISS BECAUSE THE INDICTMENT FAILED TO ALLEGE AN ESSENTIAL ELEMENT OF THE FELONY OFFENSE. THE INDICTMENT CHARGED THE APPELLANT WHO HAS NO PRIOR CONVICTIONS WITH VIOLATING W.VA. CODE §22-15-15(B)(4), AN ENHANCEMENT STATUTE, THAT REQUIRES A PREREQUISITE CONVICTION BEFORE A FELONY CAN BE IMPOSED.

II. WEST VIRGINIA CODE 22-15-15(b)(4) IS UNCONSTITUTIONALLY VAGUE AND THEREFORE IN VIOLATION OF THE DUE PROCESS CLAUSES OF ARTICLE III, SECTION 10 OF THE CONSTITUTION OF WEST VIRGINIA AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

DISCUSSION OF LAW

I. THE CIRCUIT COURT ERRED IN DENYING NORMA JEAN SAUNDERS' MOTION TO DISMISS BECAUSE THE INDICTMENT FAILED TO ALLEGE AN ESSENTIAL ELEMENT OF THE FELONY OFFENSE. THE INDICTMENT CHARGED NORMA JEAN SAUNDERS WHO HAS NO PRIOR CONVICTIONS WITH VIOLATING W.VA. CODE §22-15-15(B)(4), WHICH IS AN ENHANCEMENT STATUTE, THAT REQUIRES A PREREQUISITE CONVICTION BEFORE A FELONY CAN BE IMPOSED.

The indictment at issue charged Norma Jean Saunders with three felony counts of violating a cease and desist order pursuant to W.Va. Code 22-15-15(b)(4) of the Solid Waste Management Act. The three counts were identical except for the fact that each count alleged violations in August, October, and December of 2002. Norma Jean Saunders moved to dismiss the indictment because it failed to allege a prior conviction, which is an essential element of subsection 15(b)(4) which reads in relevant part as follows:

(4) Any person convicted of second offense or subsequent willful violation of subdivision (2) or (3) of this subsection or knowingly and willfully violating any provision of any permit, rule or order issued under or subject to the provisions of this article or knowingly and willfully violating any provision of this article, is guilty of a felony...

(Emphasis Added.)

The indictment alleged that Norma Jean Saunders

Unlawfully, feloniously, knowingly, and willfully violate[d] a cease and desist order of the West Virginia Department of Environmental Protection issued on the 28th day of August, 2002, pursuant to the Consent Order of the West Virginia Environmental Quality Board issued on the 9th day of August, 2001, in the matter of Rick's Used Auto Parts v. Ken Ellison, Director, Division of Waste Management, Department of Environmental Protection, in violation of Chapter 22, Article 15, Section 15(b)(4)...

Because the indictment failed to allege a qualifying prerequisite conviction, it does not state the essential elements of the offense, and therefore does not lawfully charge Norma Jean Saunders with a felony under subsection 15(b)(4). "The failure of an indictment to adequately state the essential elements of a criminal charge is a fundamental defect that may be raised at any time." State v. Palmer, 210 W.Va. 372, 557 S.E.2d 779 (2001). The Court has long held that "[I]n order to lawfully charge an accused with a particular crime it is imperative that the essential elements of that crime be alleged in the indictment." State v. Palmer, Syllabus Point 4, 210 W.Va. 372, 557 S.E.2d 779 (2001), quoting State ex rel. Combs v. Boles, Syllabus Point 1, 151 W.Va. 194, *S.E.2d 115 (1996).

The purpose of subsection 15(b)(4) is to enhance the conviction of a second or subsequent violation under the article to a felony. Regardless of whether the conduct violates a permit or order or a provision of the article, or that it is done knowingly or willfully, it can be not more than a misdemeanor unless there is a qualifying prior conviction. The State should have charged Norma Jean Saunders, who was a first time offender with violating a cease and desist order under the misdemeanor subsection 15(b)(3). It reads in relevant part as follows:

(3) Any person who willfully or negligently violates any provision of any permit issued under or subject to the provisions of this article or who willfully or negligently violates any provisions of this article or any rule of the secretary or any order of the secretary or board is guilty of a misdemeanor...

Section 15(b)(4) plainly requires a prior conviction before a felony may be

imposed. The trial court, however, found that a prior conviction was only one manner in which an accused may be charged with a felony under 15(b)(4). In denying the Norma Jean Saunders' Motion To Dismiss, the trial court adopted the State's interpretation of subsection 15(b)(4) and Ruled as follows:

The language includes the disjunctive "or." A plain reading of the subsection indicates that a prior conviction is one manner in which a defendant may be charged with a felony, but not the exclusive way. Here, the State alleged tracking the language of the statute, that the defendant knowingly and willfully violated a cease and desist order issued by the West Virginia Department of Environmental Protection. Thus it is not necessary for the State to allege a prior conviction.

If the trial court's interpretation of subsection 15(b)(4) prevails, there will be no functional distinction between a felony offense and a misdemeanor offense under the article. Subsection 15(b)(4), the felony, and subsection 15(b)(3), the misdemeanor, both prohibit the same conduct. They prohibit violations of any permit, rule, or order issued by the secretary or the board or violations of any provision of the article. Subsection 15(b)(3) prohibits "willful" violations, while subsection 15(b)(4) prohibits the violations in terms of "knowingly and willfully." Without a qualifying prerequisite conviction to distinguish a felony from a misdemeanor, the State would be free to charge a first time offender, with either a felony or a misdemeanor. There is no real distinction between the terms "knowingly" and "willfully."

The terms "knowingly" and "willfully" are alike in meaning and are often used interchangeably. See Stevely v. State Compensation Commissioner, 125 W.Va. 308, 24 S.E.2nd 95 (1943) ("...in order that such violation be considered willful, it must appear that

the violator had actual knowledge of the statute which he had transgressed "); Mandolodis v. Elkins Industries, 161 W.Va. 695, 246 S.E.2d 907 (1978)(where willful misconduct was recognized as conduct that was "undertaken with a knowledge and an appreciation of the high degree of risk of physical harm to another created thereby); Young v. State Compensation Commissioner, 123 W.Va 299, 14 S.E.2d 774 (1941)(where it was found that "only knowledge, deliberation, and intent are necessary to establish willful misconduct..."); Stone v. Rudolph, 127 W.Va. 335, 32 S.E. 2d 742 (1944)(where the term willfulness was deemed to "import premeditation or knowledge and consciousness...").

Certainly the Legislature intended a more definitive distinction between a felony and a misdemeanor than the use of the word "knowingly" as opposed to the nearly synonymous, "willfully." The consequences of a felony are too significant to distinguish it in such an arbitrary fashion from a misdemeanor. Aside from the possibility of a prison term, a felony may prevent an accused from voting, possessing a firearm, and obtaining certain vocational or professional licenses. The Legislature clearly intended the phrase, "[a]ny person convicted of a second offense or subsequent willful violation of" to pertain to subsequent phrases of subsection 15(b)(4), and thereby distinguish the felony from a misdemeanor in a meaningful way. Otherwise subsection 15(b)(4) is unconstitutionally vague and should be voided.

II. WEST VIRGINIA CODE 22-15-15(b)(4) IS UNCONSTITUTIONALLY VAGUE AND THEREFORE IN VIOLATION OF THE DUE PROCESS CLAUSES OF ARTICLE III, SECTION 10 OF THE CONSTITUTION OF WEST VIRGINIA AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

It is well settled that "[a] criminal statute must be set out with sufficient definiteness

to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication." State v. Flinn, Syllabus Point 1, 158 W.Va. 111, 208 S.E.2d 538 (1974). A defendant is entitled to fair notice. "The Due Process Clause requires that laws 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly,' and provide 'explicit standards for those that apply them.'" State v. Trent, 195 W.Va. 257, 263, 465, S.E.2d 257, 263 (1995) quoting Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 [227] (1972). Thus, a vagueness analysis has two elements, notice to citizens and guidelines to govern law enforcement.

Subsection 15(b)(4) does not provide fair notice or adequate guidelines for law enforcement unless the subsection is read to include the element of a prior conviction to distinguish a felony from a misdemeanor. Otherwise, the state is without express standards or guidelines and is free to arbitrarily charge any violation under the article as either a felony or a misdemeanor. It would be left to the whim of the prosecutor.

Norma Jean Saunders is also entitled to fair notice of the severity of the penalty. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment[,] but also of the severity of the penalty that a State may impose." State v. Easton, 203 W.Va. 631, 460-461, 510 S.E.2d 465, 474-475(1998) quoting BMW of North America, Inc. v. Gore, 517 U.S. 559, 574, 116 S.Ct. 1589, 1598, 134 L.Ed.2d 809, 826 (1996). See Also State ex rel. Appleby v. Recht, 213 W.Va. 503, 583S.E.2d 800 (2002)(Where the Court

instructs that "[t]he void for vagueness doctrine is an aspect of the due process requirement that statutes set forth impermissible conduct with sufficient clarity that a person of ordinary intelligence know what conduct is prohibited and the penalty if he transgresses these limitations). The Court in Easton described the necessary notice as a "dual notice requirement," which is the "requirements of notice of both the proscribed conduct and the possible penalties that may be imposed therefore." State v. Easton, 203 W.Va. 631, 641, 510 S.E.2d 465, 475.

Under the trial court's interpretation of subsection 15(b)(4), it is not possible to predict when a first time violation would be charged as a misdemeanor or as a felony. One can only speculate as to the meaning and application of this article. The language distinguishing a felony from a misdemeanor is indefinite. The indefinite language would allow this article to be selectively construed by DNR officers and prosecutors and invites discriminatory enforcement against those who for whatever reason are disfavored by the authorities.

Norma Jean Saunders illustrates this point. She is an easy, vulnerable target. The solid waste dump, which was never much of a business, was never in compliance even when her husband, Rick Saunders, was alive and well, and running things. When he died, she was left with the problem. DNR and the Kanawha County Prosecutors had a brand new law to enforce, and she was an appealing target to test the enforceability of a felony offense under subsection 15(b)(4) without the qualifying prerequisite conviction. It was a safe bet that she would not employ the services of a cadre of experienced environmental lawyers. In fact she is poor enough to qualify for a public defender lawyer.

Due Process in criminal law requires a criminal statute to provide fair notice of prohibited conduct, and not invite arbitrary and selective application by prosecutors or law enforcement, and plainly and clearly set out the possible criminal penalties. The Solid Waste Management Act does not meet these fundamental due process requirements. Under the State's interpretation of the article, they are free to either charge a misdemeanor or charge a felony for the same prohibited conduct.

In State ex rel. Whitman v. Fox, the Court struck down a conspiracy statute on due process grounds of vagueness, and cautioned:

If we upheld the part of the conspiracy statute under consideration, we would be accessories to the creation of a vehicle for great prosecutorial mischief. While a well trained lawyer might be able to grasp the breadth of imaginable evil-doing which has been prosecuted under the federal conspiracy statute, and thus take notice that he would be liable to prosecution at the caprice of any prosecutor, the man of ordinary intelligence to which the syllabus of Flinn refers would not.

State ex rel. Whitman v. Fox, 106 W.Va. 633, 639, 236 S.E.2d 565, 570 (1970). The Court further instructed,

"The conspiracy statute, as interpreted by the prosecution, would give an expansive meaning to the words 'to defraud the State,' and would make it possible to convert behavior which the Legislature has seen fit to make a misdemeanor into a felony... In the statute the word 'defraud' under the interpretation which is urged upon us by the State, would apply equally both to felonies and to misdemeanors, and we can imagine that over-zealous prosecutors, possibly from impure motives, would seek to convert myriad misdemeanors into felonies by devising some theory..."

At most, the indictment alleges a misdemeanor violation of subdivision 15(b)(3), when it accused Norma Jean Saunders of violating a cease and desist order. It does not allege the essential element of a qualifying prerequisite conviction pursuant to subsection

15(b)(4). The vagueness of the language of the Solid Waste Management Act at article 15-15(b)4 enables the State to overreach in this prosecution. Norma Jean Saunders does not have a prior conviction to meet the prerequisite of subsection 15(b)(4), and despite this fact, the State is attempting to contort the plain meaning of subsection 15(b)(4) to include a first time violation of the article.

The rules of statutory construction afford a defendant further protection from arbitrary prosecutions that rely on the creative expansion of the meaning of a criminal statute. West Virginia Code 22-15-15(b) is a penal statute. A penal statute is a law that "imposes" "a penalty, fine, or punishment for certain offenses of a public nature or wrongs committed against the state." State v. Scott, 585 S.E.2d 1, 5 (W.Va. 2003) It is well settled that penal statutes "must be strictly construed against the State and in favor of the defendant." State ex rel. Carson v. Wood, Syllabus Point 3, 154 W.Va. 397 (1970; State v. Scott, Syllabus Point 1, 585 S.E.2d 1 (W.Va. 2003). Additionally, "It is a general rule that a penal statute will not be extended by construction, but must be limited to cases clearly within its language and spirit." State v. Larkin, Syllabus Point 1, 107 W.Va. 580 (1929), State v. Scott, Syllabus Point 2, 585 S.E.2d 1.

The State is attempting to do what is prohibited, and that is to extend by construction the application of subsection 15(b)(4) to a first time offender. The government by law is limited in its prosecution of felony cases under subsection 15(b)(4) to those cases where the defendant has a qualifying prerequisite conviction.

RELIEF REQUESTED

Petitioner requests that her conviction and sentence be reversed.

Respectfully submitted,

NORMA JEAN SAUNDERS
By Counsel

A handwritten signature in black ink, appearing to read 'Barbara Brown', is written over a horizontal line.

Barbara Brown
Deputy Public Defender
W. Va. Bar No.5121
Kanawha County Public Defender Office
P.O. Box 2827
Charleston, WV 25330-2827
(304) 558-2323

Counsel For Appellant

CERTIFICATE OF SERVICE

I, Barbara A. Brown, certify that on the 11th day of May, 2006, that a copy of the attached Appellant's Brief was delivered by United States Postal Service to the Office of the Attorney General attn: Dawn E. Warfield, at Building 1, Rm. E-26, 1900 Kanawha Boulevard East, Charleston, West Virginia.



Barbara A. Brown
Kanawha County Public Defender Office
P.O. Box 2827
Charleston, WV 25330-2827
Bar Id# 5121